JAAFAR SHAARI & SITI JAMA HASHIM

v.

TAN LIP ENG & ANOR

SUPREME COURT, KUALA LUMPUR
PEH SWEE CHIN FCJ
WAN ADNAN ISMAIL FCJ
GOPAL SRI RAM JCA
[CIVIL APPEAL NO: 04-4 OF 1992]
4 OCTOBER 1997

CIVIL PROCEDURE: *No case to answer - Whether there was a submission of no case to answer - Whether court under obligation to put counsel to election that he would not call any evidence - Effect of a defendant electing not to call evidence*

EVIDENCE: *Burden of proof - Res ipsa loquitur - Whether prima facie case of negligence established - Whether prima facie case was rebutted - Whether the mere happening of an accident is res ipsa loquitur*

EVIDENCE: *Documentary evidence - Agreed bundle - Whether documents in agreed bundle may be put in evidence - Question of dispensing with formal proof - Whether maker of document has to be called*

EVIDENCE: *Hearsay - Admission - Whether statement in police report wholly exculpatory - Whether court was right in discounting police report altogether*

CIVIL PROCEDURE: *Documents - Agreed bundle - Agreement that documents in agreed bundle required no formal proof but contents not admitted - Police report in agreed bundle - Whether admissible - General principles - Whether statement an admission - Whether statement wholly exculpatory or self-serving*

The appellants were the personal representatives of the deceased who was killed in a collision involving a motor-cycle owned by the 2nd respondent and ridden by the 1st respondent. There were no eye-witnesses to the collision. The 1st respondent, however, lodged a police report ('the police report') shortly after the collision.

The appellants, relying on *res ipsa loquitur,* brought an action in negligence and claimed damages under ss. 7 & 8 of the Civil Law Act 1956. It was agreed between the parties that part II of the agreed bundle of documents would consist of those documents in respect of which formal proof was

dispensed with but the contents of which were not admitted. The police report was contained in part II of the agreed bundle. There was also a letter ('the letter') dated 21 September 1987 from the respondents' solicitors to the appellants' solicitors informing the latter in the following terms: "We suggest that the police report ... be tendered through its maker dispensing with formal proof."

At the trial, the only witness called by the appellants was the investigating officer who explained the sketch plan of the scene of the collision which he had prepared. At the close of the appellants' case, counsel for the respondents informed the court that the 1st respondent was not available to give evidence because he was out of the country. He then made a statement to the effect that he was closing his case. The Sessions Court held that the police report was not admissible and dismissed the action on the ground that there was no evidence to support the allegation of negligence made by the appellants. The appellants' appeal to the High Court was dismissed and they appealed to the instant court. Counsel for the appellants argued that both the lower courts were wrong in holding that the police report was not admissible.

Held:
Per Peh Swee Chin FCJ

[1] Since counsel for the respondents did not actually say that he wished to make a submission of no case to answer, the trial court was under **no** obligation to put to the election of counsel that he would not call any evidence. The respondents had, however, chosen to close their case at the end of the appellants' case, and they were entitled to do so although they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances require such an adverse inference to be invoked against them.

[2] The words in the letter "… tendered through its maker …" appeared to run counter to the subsequent words "dispensing with formal proof". Consequently, the police report, although included in part II of the agreed bundle, could **not** be put in evidence without calling its maker. And since the 1st respondent was not called as a witness, the police report could not be taken into account at all in deriving any conclusion.

[3] Nevertheless, based on the facts and circumstances of the case, the appellants, relying on *res ipsa loquitur*, had established a *prima facie* case of negligence which was not rebutted by the 1st respondent by means of any explanation consistent with the absence of negligence.

Furthermore, as the 1st respondent had chosen not to give evidence, an adverse inference had to be drawn against him which would have the effect of making the respondents wholly liable.

[3a] The doctrine of *res ipsa loquitur* is, in truth, a mere rule of evidence.

[3b] The mere happening of an accident is **not** *res ipsa loquitur*. However, if the accident involves a demonstrable degree of negligence, be it a minor one, then the doctrine, which is a rule of evidence, applies.

Per Gopal Sri Ram JCA

[1] It was incumbent for the sessions judge to have put counsel for the respondents to his election, namely, that if he did not call evidence, he would stand or fall on his submissions. This rule of procedure is one of essential justice and not a mere formality. Once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

[2] Where a document is included in an agreed bundle without any qualification, then **no** question as to its formal proof arises and its contents may be relied upon to establish a fact in issue. Conversely, if the agreement (between the solicitors) is only to dispense with formal proof of the making of the document, then the contents of the document may **not** be so used.

[3] A party may rely upon an admission made by his opponent in a police report or other documentary hearsay included in an agreed bundle on the condition that only its formal proof is dispensed with. However, if such a document is **wholly exculpatory** of the maker, then it is pure hearsay and **not** admissible.

[3a] In the present case, the police report was **not** wholly self-serving. It contained an **admission** by the 1st respondent of the circumstances in which he collided with the deceased. The trial court was, therefore, wrong in discounting the police report altogether as a purely exculpatory statement.

[4] The admission by the 1st respondent of the circumstances in which the collision occurred, taken together with other silent evidence, reasonably supported the inference that the 1st respondent was solely to blame for the collision.

[Appeal allowed; damages modified.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Tiada kes untuk dijawab - Samada terdapatnya penghujahan mengenai tiada kes untuk dijawab - Samada mahkamah di bawah kewajipan untuk memberi pilihan kepada peguam bahawa beliau tidak akan memanggil sebarang keterangan - Kesan defendan memilih untuk tidak memanggil keterangan*

KETERANGAN: *Beban membukti - Res ipsa loquitur - Samada kes prima facie kecuaian ditentukan - Samada kes prima facie dipatahkan - Samada peristiwa kemalangan semata-mata adalah res ipsa loquitur*

KETERANGAN: *Keterangan dokumentar - Ikatan yang dipersetujui - Samada dokumen dalam ikatan yang dipersetujui boleh dikemukakan dalam keterangan - Persoalan memberikan bukti rasmi - Samada pembuat dokumen harus dipanggil*

KETERANGAN: *Khabar angin - Pengakuan - Samada pernyataan dalam laporan polis sesungguhnya bersifat membebaskan daripada tuduhan - Samada mahkamah betul dalam tidak mempercayai laporan polis sama sekali*

PROSEDUR SIVIL: *Dokumen-dokumen - Ikatan yang dipersetujui - Perjanjian bahawa dokumen-dokumen dalam ikatan yang dipersetujui tidak memerlukan bukti rasmi tetapi kandungannya tidak diterima - Laporan polis dalam ikatan yang dipersetujui - Samada boleh diterima - Prinsip-prinsip am - Samada pernyataan satu pengakuan - Samada pernyataan sesungguhnya bersifat membebaskan daripada tuduhan atau menyampaikan pada diri sendiri*

Perayu-perayu merupakan wakil peribadi simati yang telah terbunuh dalam satu perlanggaran yang melibatkan sebuah motosikal yang dimiliki oleh responeden kedua dan ditunggang oleh responden pertama. Tiada saksi kepada perlanggaran itu. Responden pertama, namun begitu, telah membuat laporan polis laporan polis sejurus selepas perlanggaran itu.

Perayu-perayu, bergantung pada res ipsa loquitour, telah memulakan tindakan atas kecuaian dan menuntut gantirugi di bawah s. 7 & 8 Akta Undang-Undang Sivil 1956. Adalah dipersetujui antara pihak-pihak tersebut bahawa bahagian II ikatan dokumen yang dipersetujui akan mengandungi dokumen-dokumen berhubung dengan yang mana bukti rasmi telah dikemukakan tetapi kandungannya telah tidak diterima. Laporan polis terkandung dalam bahagian II ikatan yang dipersetujui itu. Terdapat juga surat ('surat tersebut') bertarikh 21 September 1987 daripada peguamcara responden kepada peguamcara perayu memaklumkan pihak yang terkemudian itu menurut ungkapan yang berikut: "We suggest that the polis report ... be tendered through its maker dispensing with formal proof."

Di perbicaraan, satu-satunya saksi yang dipanggil oleh perayu adalah pegawai menyiasat yang telah menerangkan pelan lakar tempat kemalangan yang telah beliau sediakan. Dalam menutup kes perayu, peguam bagi pihak responden telah memaklumkan mahkamah bahawa responden pertama tiada untuk memberi keterangan kerana beliau berada di luar negeri. Beliau kemudiannya telah membuat satu pernyataan berhubung dengannya bahawa beliau sedang menutup kes beliau. Mahkamah Sesyen memutuskan bahawa laporan polis tidak boleh diterima dan telah menolak tindakan atas alasan bahawa tidak terdapat keterangan untuk menyokong pengataan kecuaian yang telah dibuat oleh perayu-perayu. Rayuan perayu-perayu kepada Mahkamah Tinggi telah ditolak dan mereka telah merayu kepada mahkamah ini. Peguam bagi pihak perayu-perayu telah berhujah bahawa kedua-dua mahkamah rendah salah dalam memutuskan bahawa laporan polis tidak boleh diterima.

Diputuskan:
Oleh Peh Swee Chin HMP

[1] Oleh kerana peguam bagi pihak responden tidak sebenarnya menyatakan bahawa beliau ingin membuat satu penghujahan mengenai tiada kes untuk dijawab, mahkamah perbicaraan tidak berada di dalam apa-apa kewajipan untuk memberi pilihan kepada peguam bahawa beliau tidak akan memanggil sebarang keterangan. Responden-responden, namun begitu, telah memilih untuk menutup kes mereka di penghujung kes perayu-perayu, dan mereka berhak untuk melakukan sedemikian walau pun mereka akan berada dalam bahaya berhubung dengan tidak mempunyai keterangan saksi mereka yang paling penting dan berhubung dengan mempunyai inferens yang bertentangan disediakan terhadap mereka kerana gagal memanggil keterangan yang sedemikian sekiranya keadaan memerlukan inferens bertentangan yang sedemikian digunakan terhadap mereka.

[2] Perkataan-perkataan dalam surat "... tendered through its maker ..." Nampaknya bertentangan dengan perkataan-perkataan berikutnya "dispensing with formal proof". Akibatnya, laporan polis, walaupun termasuk dalam bahagian II ikatan yang telah dipersetujui, tidak boleh mengemukakan keterangan tanpa memanggil pembuatnya. Dan oleh kerana responden pertama telah tidak dipanggil sebagai saksi, laporan polis tidak boleh diambil kira sama sekali dalam mencapai apa-apa keputusan.

[3] Namun begitu, berdasarkan fakta-fakta dan keadaan-keadaan kes itu, perayu-perayu, dalam bergantung pada *res ipsa loquitur,* telah menentukan kes *prima facie* kecuaian yang mana telah tidak dipatahkan

oleh responden pertama melalui apa-apa penjelasan yang konsisten dengan ketiadaan kecuaian. Lagipun, oleh kerana responden pertama telah memilih untuk tidak memberi keterangan, satu inferens yang bertentangan haruslah disediakan terhadap beliau yang mana akan mempunyai kesan menjadikan responden-responden bertanggungan sesungguhnya.

[3a] Doktrin *res ipsa loquitor* adalah, sebenarnya, suatu kaedah semata-mata mengenai keterangan.

[3b] Kejadian kemalangan itu semata-mata bukannya *res ipsa loquitur*. Walaubagaimanapun, jika kemalangan itu melibatkan satu tahap kecuaian yang boleh ditunjukkan, walaupun ianya kecil sekali, maka doktrin, yang mana merupakan kaedah keterangan, terpakai.

Oleh Gopal Sri Ram HMR

[1] Ianya terletak pada hakim Mahkamah Sesyen untuk mengenakan pilihan pada peguam bagi pihak responden, iaitu bahawa jika beliau tidak memanggil keterangan, beliau akan kekal berpendirian atau jatuh berdasarkan keterangan beliau. Kaedah prosedur ini merupakan satu keadilan yang penting dan bukannya hanya suatu formaliti. Sebaik sahaja defendan dalam prosiding sivil memilih untuk tidak memanggil keterangan, maka kesemua keterangan yang dikemukakan oleh plaintif mestilah dianggap benar.

[**2**] Di mana sesuatu dokumen dimasukkan dalam sesuatu ikatan yang telah dipersetujui tanpa sebarang kelayakan, maka tiada persoalan berhubung dengan bukti rasmi berbangkit dan kandungannya boleh diharapkan untuk menentukan sesuatu fakta dalam isu. Adakah diperkatakan, jika perjanjian (antara peguamcara-peguamcara) adalah semata-mata untuk tidak mengemukakan bukti rasmi mengenai pembuatan dokumen itu, maka kandungan dokumen tersebut tidak mungkin digunakan sedemikian.

[3] Sesuatu pihak mungkin akan bergantung kepada suatu pengakuan yang dibuat oleh lawannya dalam sesuatu laporan polis atau khabar angin dokumentar yang lain yang termasuk dalam ikatan yang dipersetujui atas alasan bahawa hanya bukti rasminya ditolak. Walaubagaimanapun, jika dokumen yang sedemikian sesungguhnya bersifat membebaskan dari tuduhan akan pembuatnya, maka ianya semata-mata merupakan khabar angin dan tidak boleh diterima.

[3a] Dalam kes semasa ini, laporan polis tidak sesunggunya menyampaikan maksudnya sendiri. Ianya mengandungi satu pengakuan oleh responden pertama akan keadaan-keadaan tersebut dalam mana beliau telah berlanggar dengan simati. Mahkamah perbicaraan, adalah, dengan itu salah dalam menolak laporan polis itu sama sekali sebagai satu pernyataan yang mempunyai sifat membebaskan daripada tuduhan.

[4] Pengakuan oleh responden pertama akan keadaan-keadaan dalam mana berlakunya perlanggaran tersebut, apabila diambil bersama-sama dengan keterangan sepi yang lain, secara wajarnya menyokong inferens bahawa responden pertama adalah seharusnya dipersalahkan semata-mata bagi perlanggaran tersebut.

[Rayuan dibenarkan; gantirugi diubah.]

Cases referred to:
(by Peh Swee Chin FCJ)
Simirah v. Chua Hock Lee & Anor [1963] MLJ 239 ***(cit)***
Yuill v. Yuill [1945] P 15 ***(cit)***
Young v. Rank [1950] 2 All ER 166 ***(refd)***
Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 337 ***(foll)***
Borneo Co (M) Sdn Bhd v. Penang Port Commission [1975] 2 MLJ 204 ***(foll)***
Cookson v. Knowles [1978] 2 All ER ***(refd)***
Menon v. Pigeonneau [1957] MLJ 85 ***(refd)***
Henry Trading Co Ltd v. Harun [1966] 2 MLJ 281 ***(foll)***
Baker v. Market Harborough [1953] 1 WLR 1472 ***(dist)***
France v. Parkinson [1954] 1 All ER 739 ***(foll)***
Chong Pik Sing & Anor v. Ng Mun Bee [1985] 1 MLJ 443 ***(foll)***

(by Gopal Sri Ram JCA)
Chuah Ah Chee & Ors v. Gurdial Singh & Anor (High Court Malaya, Penang; Civil Suit No: 351 of 1979) ***(refd)***
Wasakah Singh v. Bachan Singh [1931] 1 MC 125 ***(refd)***
MA Clyde v. Wong Ah Mei [1970] 2 MLJ 183 ***(foll)***
Tan Song Gou v. Goh Ya Tian [1983] 1 MLJ 60 ***(foll)***
Yew Lean Finance Development (M) Sdn Bhd v. Tan Gin Thong [1985] 1 CLJ 299 ***(foll)***
Henry Trading Co Ltd v. Harun [1966] 2 MLJ 281 ***(foll)***
Borneo Co (M) Sdn Bhd v. Penang Port Commission [1975] 2 MLJ 204 ***(foll)***
Wong Thin Yit v. Mohamed Ali [1971] 2 MLJ 175 ***(foll)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1992] 3 CLJ 1600 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7, 8
Evidence Act 1950, s. 58
Subordinate Court Rules 1980, O. 28 rr. 16(1), (2), (3)

Other sources referred to:
The Bundle of Discord, Lim Kean Chye, *Insaf,* 1988, September
Practice Note 1/48
Practice Note 2/77

[Appeal from High Court Malaya, Alor Setar; [1992] 3 CLJ 1600]

For the appellants - Baldev Singh Bhar; M/s Baldev Bhar
For the respondents - PR Manekshaw; M/s VP Nathan & Partners

JUDGMENT

Peh Swee Chin FCJ:

This appeal involves a fatal accident to a pedestrian together with a motor cyclist; the latter did not give evidence in the trial court, who according to his counsel, was abroad at that time while there was no other living eye-witness to the accident apart from the motor cyclist. The somewhat unusual situation has given rise also to certain controversial questions which have to be decided.

The plaintiffs are the administrators of the deceased pedestrian while the first defendant was the motorcyclist and the second defendant, the registered owner of the motorcyle driven by the first defendant. The result in the Sessions Court, the trial court, was that the claims of the plaintiffs were dismissed with costs but the Sessions Court further correctly proceeded to assess damages on the assumed basis of total liability as follows in the event of an appeal:

(a) Agreed special damages	RM1,500
(b) Damages for lost years	RM10,635
(c) Damages for loss of expectation of life	RM6,000
(d) Damages for loss of services to the children of the deceased	RM5,117
(e) Damages for loss of consortium to the husband	RM1,500
(f) Interest in the usual terms and costs	Unspecified

The plaintiffs appealed to the High Court against the dismissal of their claims; such appeal was dismissed with costs, hence the further appeal before us now.

The memorandum of appeal is brief and the relevant part of which is set out below:

1) The learned High Court Judge erred in law when he rejected and failed to consider the contents of the police reports of both the deceased and the defendants and in doing so misapplied s. 32 of the Evidence Act 1950 and failed to apply s. 73A of the said Act.

2) The learned High Court Judge erred in law when he agreed with the learned Trial Judge that the doctrine of *res ipsa loquitur* did not apply to this case.

3) The appellant therefore pray that this appeal be allowed and or such order be made as justice of the case may require.

It is to be borne in mind that the damages as assessed by the trial court, were not disputed by both parties subject of course to proof of liability.

Save that the defendants admitted that there was a collision between the motor cycle KQ 7364 driven by the first defendant and owned by the second defendant and a pedestrian on 25 March 1984 at about 10.15 am along Alor Star/Sg. Petani Road, every allegation of negligence or of loss caused by the defendants was denied in the statement of defence.

The first plaintiff gave evidence to the effect that he was the husband of one Shofiah bt Ahmad who was killed in the above-mentioned accident. A post-mortem report on her was produced. This aspect of the evidence was not challenged in cross-examination.

Circumstantial evidence of and about the accident, came from Ag Sgt Baharom b Hashim (PW4) who said he investigated the accident involving Shofiah bte Ahmad (the deceased) and motorcyclist Tan Lip Eng, (the first defendant). He went to the scene and saw the motor cycle KQ 7634 lying beside the centre white line. He drew a sketch plan and prepared a key thereto which were put in evidence. A report was lodged by the first defendant, his police report being No. 424/84. A few observations have to be made by me about this report. It appears to be a report written in all probability by the first defendant who described himself as a student aged 18. It does not appear to have been recorded by Sgt Baharom or any other policeman from the first defendant. It was signed by the first defendant, and the police personnel before whom he had so signed, if he did sign before any such person, was not named thereon. More probably, nobody in the police station had watched him write or sign the report. One PC Razali (84151), had merely signed it on copies of the report 424/84 as the person who made copies for supplying the same to the counsel in this case while Cpl LC Lai (30726) had signed it as the person who had checked (semak) the said report. Sgt Baharom said further in evidence that he found the front number plate "dislodged" and the front lamp and left front signal light broken.

The sketch plan shows the motorcycle to be lying on its left side body very close to the centre dividing lines (double lines), fairly parallel to the centre lines, the front wheel was 2ft 6ins to the nearer centre white line while the rear one 2ft 7in to the same white line.

At the end of evidence called for the plaintiffs, learned counsel for the defendants informed the court he was not calling any witness and was closing his case and that the first defendant was away overseas (Australia), and expected to be so away for another two years. He suggested that since the defendants were not giving any evidence, then under O. 28 r. 16(3) of the Subordinate Court Rules 1980, the plaintiffs should first make their submission to be replied thereto by the defendants later. Order 28 r. 16(1), (2), (3) are set out below:

> Order 28 r. 16
>
> (1) The Judge before whom an action is heard may give directions as to the party to begin and the order of speeches at the trial, and, subject to any such directions, the party to begin and the order of speeches shall be that provided by this rule.
>
> (2) Subject to para. (6) the plaintiff shall begin by opening his case.
>
> (3) If the defendant elects not to adduce evidence, then, whether or not the defendant has in the course of cross-examination of a witness for the plaintiff or otherwise put in a document, the plaintiff may, after the evidence on his behalf has been given, make a second speech closing his case and the defendant shall then state his case.

Order 28 r. 16(1), (2), (3) regulate the order of speeches when an action comes up for hearing in the ordinary way in the absence of any contrary or other directions from the court and provide that where the defence elects not to adduce evidence, a plaintiff may make his closing speech. These rules do not deal with the matter of making a submission of no case to answer by a defendant at the close of a plaintiff's case.

It will be noticed that in the instant case, the defence counsel did not say that he wished to make a submission of no case to answer, for if the defence had wished to make it, then the trial court would be under an obligation to put to the election of the defence counsel that he would not call any evidence because the same court would not rule on such submission of no case to answer in the absence of such declared election. Otherwise, the court would make its ruling or decision only after hearing the entire evidence (and submission) of the defence if any. See the case of *Simirah v. Chua Hock Lee and Anor.* [1963] MLJ 239 CA.

The reason for such obligation by the trial court is that no judge should be asked for his conclusion or opinion on the evidence until such evidence is concluded. Thus should a defendant make a submission of no case to answer without being asked by the trial court to make such an election, and if the trial court then makes its ruling or decision on such submission, the defendant would still be entitled to call evidence as if he had not made such a submission, see *Yuill v.Yuill* [1945] P 15 CA. Thus, should the trial court deliver its decision on such submission without performing such obligation and should the case go to an appellate court, which is unable to agree with such ruling or decision of the trial court, the appellate court would be without the benefit of whole of evidence of the case which the defendant would have been entitled to adduce and to use the words of Devlin JA in *Young v. Rank* [1950] 2 All ER 166, 169 CA "the appellate court would be prevented from exercising its power of re-hearing", leaving the appellate court with no alternative but to order a retrial.

In the instant case, there was no intention expressed about making a submission of no case to answer, therefore there was no need for the trial court to put the defence to such election. Any such perceived intention was in fact very clearly contradicted by the defence referring to O. 28 r. 16(3) aforesaid applicable to a normal order of speeches in the Sessions Court. The defendants had however chosen to close the case at the end of the plaintiff's case, they were entitled to do so though they would be in peril of not having the evidence of their most important witness and of having any adverse inference drawn against them for failing to call any such evidence should the circumstances appropriately call for such an adverse inference or for the presumption of avoiding unfavourable evidence by the defence to be invoked against the defendants.

I now come to the crunch in relation to the police report made by the first defendant ie, report No. 424/84 which could throw some significant light on the manner of the accident, but which the defendants sought to exclude it as being inadmissible; while the plaintiffs contended to the contrary. Both the Sessions Court and the High Court found that the report no 424/84 was correctly excluded from evidence for reasons of their own.

The report no. 424/84 was in fact included in "Part II" of the "Agreed Bundle of Documents" with its "Part 1" comprising another police report about the death of the "victim" involved in the report of no. 424/84 and other documents. Report no. 424/84 was the only document in the said Part II.

It was in "Part II" in all probability, because of a letter dated 21 September 1987 from defendants' solicitors to plaintiffs' solicitors *inter alia* informing the latter:

> We suggest that the police report no. 424/84 be tendered through its maker dispensing with formal proof.

The letter was apparently sent in connection with the composition of the agreed bundle of documents for use at the trial in Sessions Court. It was referred to expressly in the written submission of the learned counsel for the defendants at the Sessions Court, (as the letter "marked A"), as is apparent from p. 87 of the Appeal Record for the use of the Federal Court. The said letter marked "A" apparently was not put in the said Appeal Record. Its non-inclusion was brought to the notice of both parties in the instant appeal and they all have agreed to have it included in the said Appeal Record.

Looking at the words of the said letter in connection with the report 424/84, the words "tendered through its maker" would appear to run counter to the words "dispensing with formal proof". For myself, I would interpret them as meaning simply that the maker must be called to prove it, in other words, its authenticity is not agreed to. "Dispensing with formal proof" are words which are vague by comparison. The words may mean different things to different people. Some may say that they mean that the maker would be required for cross-examination and that the maker need not be called. Someone else may say that some proof, but not of a high or strict degree is required. In my view the words "dispensing with formal proof" in the face of the words: "tendered through its maker" are an otiose verbal surplus, and should be disregarded and rejected because the words tend to contradict the clear and doubtless latter words and they further could not be used in any way to modify the latter words.

Following this interpretation, the report no. 424/84, though included in Part II of the "Agreed Bundle of Documents" could not be put in evidence without calling the maker. It is elementary that to call a maker or writer of a document is the best evidence or primary evidence of the document's authenticity or existence. The report no. 424/84 consequently could not be taken into account at all for arriving at any conclusion in the instant appeal. I therefore agree with both the Sessions Court and the High Court for excluding the report but for entirely different reasons.

I ought to touch on, but only briefly, the question of agreed bundle of documents in the absence of any express conditions in regard to inclusion of any of such documents in the agreed bundle, such as the condition about calling the maker of report 424/84 dealt with above, or other condition or term,

as so much energy was concentrated on the question of an agreed bundle of documents, and also in order to explain further my exclusion of the report no. 424/84.

It goes without saying that either or any of the parties to any particular civil case can effectively object to the inclusion of any document in an agreed bundle of documents, and further he is at liberty to impose conditions upon which any particular document is included therein, if he agrees in the first place to such inclusion.

IN THE ABSENCE OF ANY EXPRESS CONDITIONS REGARDING THE INCLUSION OF ANY OF THE DOCUMENTS IN THE AGREED BUNDLE OF DOCUMENTS, speaking for myself, I have always taken the agreed bundle in a civil case to mean as follows without meeting any contradiction or any serious contradiction from any member of the Bar or any appellate court in my decades at the Bar or on the Bench.

First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling eg, their makers.

Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.

Thirdly, such documents therein do not form automatically a part of the evidence of the case in question *ipso facto*, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, *inter alia*, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, eg, either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including any "written hearsay" contained therein. The court, may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate for reasons for such refusal.

I find support for my views or some of my views in a learned article under the title of "The Bundle of Discord" written by Mr Lim Kean Chye a very senior member of the Malaysian Bar, published in "Insaf", its September issue, 1988; also Shankar J's (now Shankar JCA's) judgment in *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 337; both Federal Court cases of *Henry Trading v. Harun* [1966] 2 MLJ 281 and *Borneo Co. v. Penang Port Commission* [1975] 2 MLJ 204; Practice Note no. 1/48; Practice Note no. 2/77 and s. 58 of the Evidence Act 1950.

It is important enough for me to repeat that if there are any express conditions or terms in regard to the inclusion of any document to the agreed bundle, then the document would have to be dealt with according to and subject to such express conditions.

I revert now to the question of liability in this case. The first defendant, the maker of the report 424/84 did not give evidence. Every allegation of negligence in the pleading had been denied by the defendants and the plaintiffs had relied on the doctrine of *res ipsa loquitur,* specified as grounds in both memorandums of appeal in question.

The doctrine of *res ipsa loquitur* is, in truth, a mere rule of evidence, per Whyatt CJ in *Menon v. Pigeonneau* [1957] MLJ 85, and it means that an event which, in the ordinary course of things, is more likely than not to have been caused by negligence is, by itself, evidence of negligence. Thus in *Menon (supra),* the event that invoked the doctrine was stated by the court of Appeal to be the defendant's car turning across the road to its wrong side, and this was said to lead to a *prima facie* case of negligence which had to be rebutted. The doctrine is of course not applicable in criminal cases, but only in civil cases.

It is in this connection, to be borne in mind, that the mere happening of an accident is not *res ipsa loquitur,* but if such an accident involves at least a demonstrable degree of negligence, be it minor one, then the doctrine which is a rule of evidence, applies.

It was proved through the relevant sketch plan that the fatal accident in the instant appeal took place very close to the centre of the road, even though not directly on the central dividing double lines. After falling on its left side body, on its left half of the road but beside the centre dividing lines, the motor cycle's right front wheel was 2ft 6in and left wheel 2ft 7in respectively from the said double lines. The width of the motor cycle's left half of the road was 30ft. In these circumstances it would not be wrong for a court in these circumstances to say that the accident took place practically at or near the centre of the road. If the motorcycle's left half of the road was 30ft wide,

how and why on earth should a motor cycle go to the centre of the road there to have a collision with a pedestrian who died of the injuries caused thereby?. In the absence of any indications to the contrary on the sketch plan, the motor cyclist would appear to be *prima facie* negligent for failing to keep more to its left side of the road; for failing to avoid an accident or for failing to keep a proper look-out. For illustration, examples of the said indications to the contrary could be the presence of the deceased's body on her wrong side of the road or evidence of some blood stains on the deceased's wrong side which did not come from the motor cyclist. Such indications could have negatived a *prima facie* presumption of negligence or *res ipsa loquitur*, whereupon it would behove the plaintiffs to prove negligence affirmatively against the motor cyclist. The similar sort of *prima facie* negligence presumed against the motor cyclist above could of course be similarly presumed against the opposite party involved in the same accident *viz.* the deceased who was dead at the trial however, but this will depend on whether certain adverse inference could be drawn. I will deal with this aspect more at a later stage. The court has been deprived of the chance to look at the excluded report no. 424/84, and of the chance to hear an explanation from the first defendant as to how it happened. Yet the first defendant could not be more than a few hours away by air from Australia and who, it must have been decided by the defence, need not attend court. The cost of an airline return ticket would have been by no means an insurmountable difficulty to the first defendant.

The nett result is that the plaintiffs had established a *prima facie* case of negligence as described above or *res ipsa loquitur* which had not been rebutted by the first defendant by means of any explanation consistent with absence of negligence or to show who was actually negligent.

I am fortified in my view of such *prima facie* case of negligence by a reconsideration of those two well-known cases of *Baker v. Market Harborough* [1953] 1 WLR 1472 CA and *France v. Parkinson* [1954] 1 All ER 739 CA.

In *Baker* case, two motor vehicles were involved in a collision in the centre of the road during the hours of darkness when both drivers were killed. In the absence of any evidence in this cited case, enabling the court there to draw a distinction between the two deceased drivers on the question of negligence, ie, as to who was actually negligent, the Court of Appeal unanimously held that both drivers were equally to blame. The rationale for the decision was explained very clearly by Lord Denning LJ (as he then was) as follows at p. 1476 as follows.

> It is pertinent to ask, what would have been the position if there had been a passenger in the back of one of the vehicles who was injured in the collision? He could have brought an action against both vehicles. On proof of the collision in the centre of the road, the natural inference would be that one or other or both were to blame. If there was no other evidence given in the case, because both drivers were killed, would the court, simply because it could not say whether it was only one vehicle that was to blame or both of them, refuse to give the passenger any compensation? The practice of the courts is to the contrary. Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence, the result must be the same. In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame.
>
> Now take this case where there is no passenger, but both drivers are kilied, the natural inference, again, is that one or other was, or both were, to blame. The court will not wash its hands of the case simply because it cannot say whether it was only one vehicle which was to blame or both. In the absence of any evidence enabling the court to draw a distinction between them, it should hold them both to blame, and equally to blame.

I have cited the above passage in connection with both opposing drivers being dead and there being no eye-witness, subject to my own view that the mere happening of an accident is not *res ipsa loquitur* as explained above.

In *France* case, France had hired his car to one Fitzgerald who was involved in a collision with another car at cross-roads, the roads being of equal status. After the accident the said Fitzgerald disappeared and could not be traced. France sued Parkinson, the driver of the opposite car. The English Court of Appeal held unanimously after also considering the *Baker* case *supra*, that in the absence of specific circumstances, the balance of probabilities was in favour of both drivers having been negligent. Parkinson did not give evidence though he had given a statement to the police. His counsel elected to call no evidence and made a submission of no case to answer. Thus the court was not enable to make any distinction between both drivers on the question of negligence (ie, as to who was negligent, or more negligent, or not negligent). In the cited case since both parties were held to be negligent. At the end of plaintiffs case, the result was that there was a *prima facie* case of negligence for Parkinson ie, one of the two parties, to rebut. Since Parkinson did not give evidence, France was held to be entitled to all the damages as agreed by both parties in that case on the assumed basis of total liability.

France case threw light by the way on an interesting aspect of that case. France, not being the driver but as owner of the car had sued as a plaintiff, he was held to be in the position of a passenger in the car, and was therefore entitled to claim all the damages (ie, on the 100% basis): for like a passenger, he could not be guilty of any contributory negligence. Further an adverse inference (which is material for our instant case), was drawn against Parkinson for not giving evidence, and in this connection Birkett LJ said at p. 740:

> I agree. Each of these cases must, of course, be decided on its own facts, and the facts, as we know them, have been detailed by my Lord in outline. The principal feature in this case is that at the time when this accident happened these two roads, although unequal in width, could be regarded as of equal status. The cross-roads, as shown on the plan, are very spacious, and in the ordinary way one would think that, if people exercised ordinary care, an accident would not take place there. We only know that a collision did take place between two motor cars at that wide and spacious cross-roads. I should have thought that on those facts there was a *prima facie* case that both the drivers were negligent. In any event, I am satisfied that there was a *prima facie* case of negligence against the defendant. The defendant was available to give evidence and he did not do so. If there is, as I think there, *prima facie* evidence of negligence on the part of the defendant and he chooses to make no attempt to show he was not negligent, I think an adverse inference must be drawn against him. The plaintiff was strictly in the position of a passenger in the car, and it was enough for him to prove negligence against the defendant even if it were not the whole of the negligence. I think, in those circumstances, that the plaintiff was entitled to recover the agreed damages against the defendant and the appeal ought to be allowed.

It ought to be emphasised that the agreed damages were so agreed on the assumed basis of 100% before judgement in the trial court.

The *res ipsa loquitur* has not been rebutted by the defendants in the instant case as stated earlier. In other words, the *prima facie* negligence remains unrebutted. Further since the first defendant had chosen not to give evidence, though only a few hours away by air in Australia, an adverse inference simliar to that in *France* case would be drawn against him, the adverse inference being that the first defendant could not have given any explanation consistent with absence of negligence. This adverse inference, would have the effect of thereby making defendants wholly to blame, following the case of *France (supra).* If hypothetically, the first defendant had died also in the same accident, and therefore there was no such adverse inference, I would have followed the case of *Baker (supra),* by holding both equally to blame on the facts of this case. This is, of course, by way of illustration as to how I would apply the *ratio* in the *Baker* case *(supra)* which I have cited above.

It would have been noticed that in both *Baker* and *France* cases, the Court of Appeal in England did not mention the doctrine of *res ipsa loquitur*. I venture to suggest that if the doctrine is merely a rule of evidence, I imagine it would have been neither necessary nor essential to mention it. I would say that in both cases, there, the *doctrine of res ipsa loquitur* would have been applicable in any event due apparently to both accidents in both cited cases having taken place at two cross roads of equal status or of equal width.

On the damages as assessed by the Sessions Court the award for the sum of RM1,500 as damages for loss of consortium cannot stand and should be set aside, following Federal Court case of *Chong Pik Sing and Anor v. Ng Mun Bee and Others* [1985] 1 MLJ 443. It is interesting to note in passing that after the date of the accident in this case, any claim for loss of consortium (society) and of services from a deceased wife was abolished also by Civil Law (Amendment) Act 1984. Save for this sum of RM1,500, the rest of the damages as assessed by the Session Court should remain and are thereby confirmed, except that the sum of $5117 for loss of services to the children should be dealt with as stated below and interest on such damages the rates of which and duration for which were not specified by the Sessions Court and should be as follows.

On agreed special damages of RM1,500, interest will run from date of accident to date of judgement at 4% pa and thereafter at 8% pa to date of satisfaction.

Damages for lost years should carry no interest. But damages for loss of expectation of life shall carry interest at 8% pa from date of service to date of judgement of the Sessions Court and thereafter at the same rate until its satisfaction. Damages for loss of services to the children were assessed by the Sessions Court at RM5,117 on the basis of nine years' purchase (annuity tables) at the rate of RM60 pm without dividing the damages into two parts (in accordance with *Cookson v. Knowles* [1978] 2 All ER 12 604), *viz.* pre-trial and post trial figures. Doing what is appropriate here, the pre-trial loss of services should be computed on the basis of RM60 pm from date of accident to date of judgement of the trial court and shall carry interest at 4% pa thereon. For post-trial loss of services of the deceased, the post-trial figure would be the sum of RM5,117 (the sum assessed by the Sessions Court on nine year's purchase) less the sum computed at RM60 pm to date of judgment from the date of accident as stated earlier. Further such post-trial figure shall carry no interest.

The appeal of the appellants is therefore allowed and the orders of High Court and Sessions Court below set aside. Judgment is entered for agreed special damages and for damages as assessed by the Sessions Court but modified by us in the manner stated above. The respondents would pay costs here and in

both courts below. The deposit for costs in court is to be refunded to the appellants.

YA Dato' Wan Adnan, another member of the presently-constituted quorum of the Federal Court, has written to say that he agrees to this judgment of mine and its reasoning, (such reasoning being different from the reasoning of the third member of the said quorum). Such being the case with respect, I would add that my reasoning in this judgment or the whole of the judgment is a majority judgment for the purpose of drawing up of the order by the parties herein, which will take into account the variations to the figures in regard to the general as well as special damages as assessed by the said Sessions Court and not disputed by both parties on appeal to the High Court earlier and also incidentally for the purpose of judicial precedent.

Gopal Sri Ram JCA:

This appeal raises a short but important point of adjectival law. For that reason judgment was reserved at the close of arguments. The conclusions I have arrived at in this case and the reasons for the same now follow.

The appellants are the personal representatives of Shofiah bte Ahmad ('the deceased') who was killed in a collision involving a motor cycle owned by the second respondent and ridden by the first respondent. Apart from the first respondent, there were no eyewitnesses to the accident. However, the first respondent lodged a police report a few minutes after the collision. In it he gave a fairly detailed account about the way in which the accident occurred.

The appellants brought an action in negligence and claimed damages under ss. 7 and 8 of the Civil Law Act 1956. Their action was tried before the Sessions Court at Alor Setar. The documents relevant to the case were placed in an agreed bundle. The respondents' solicitors wrote to the appellants' solicitors about the preparation of the bundle. It is a letter of some importance. I will deal with it later in this judgment. Suffice for the present to say that the agreed bundle was, in accordance with the agreement reached between solicitors for the respective parties, divided into two parts. Part I comprised those documents the contents of which was admitted. Part II consisted of those documents in respect of which formal proof was dispensed with, but the contents of which were not admitted. Among the documents in Part II was the first respondent's police report.

At the trial the only witness called by the appellants upon the question of fault was the Investigating Officer who, *inter alia*, explained the sketch plan of the scene of the accident, which he had prepared. At the close of the appellants' case, counsel for the respondents informed the court that the first

respondent was not available to give evidence because he was out of the country. He then made a statement to the effect that he was closing his case.

The record provided to this court does not reflect that the learned Sessions judge, who has much experience in such matters, formally put counsel to his election that he would stand on his submissions. This is unfortunate because the procedure adopted does not appear to meet the requirements of adjectival law.

The first respondent being away from the country and therefore being unable to testify was a fact. It had, in the absence of an agreement between counsel, to be established like any other fact by calling evidence. Once established, certain consequences would ensue in respect of the admissibility of the statements by him to the police officer who reduced them into writing in the form of a police report. It was only after evidence was led tending to prove the first appellant's absence as a fact, or an agreement as to that fact having been secured from his opponent, that counsel would have been entitled to inform the court that he was not calling any evidence. Once he had done this, it was incumbent for the learned Sessions judge to have put counsel to his election, namely, that if he did not call evidence, he would stand or fall on his submissions. The rule of procedure, which requires these steps to be followed, is not a mere formality but one of essential justice. For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

In this context it is sufficient to refer to the following passage in the judgment of Elphinstone CJ *Wasakah Singh v. Bachan Singh* [1931] 1 MC 125, 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. **At this stage the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.** (Emphasis added.)

In his address to the trial court, counsel for the respondents argued that the first respondent's police report was inadmissible and could not therefore be taken into account in deciding whether negligence had been proved. In support of his argument counsel relied on the unreported judgment of Edgar Joseph Jr J (as his Lordship then was) in *Chuah Ah Chee & Ors v. Gurdial Singh & Anor* (Penang High Court Civil Suit No. 351 of 1979). That too was a running down action. The defendant driver had made a police report in which he exculpated himself from blame for the accident. He died before the action could come on for hearing. His police report was included in an agreed bundle

for the purpose of dispensing with formal proof. At the trial the question arose as to whether the deceased defendant's police report was admissible and could be relied upon by the defendants. His Lordship held, and in my view correctly, that the deceased driver's police report, though placed in the agreed bundle, was not admissible and could not therefore be relied upon by the defendants. He said:

> However, the effect in law of this report, bearing in mind that it was a self-serving statement made by a person who was not called at the trial, was that it was worthless as evidence being nothing more than hearsay. None of the exceptions to the hearsay rule embodied in s. 32 of the Evidence Act 1950, applied. It makes no difference that it was included in an agreed bundle of documents, because this was done merely to dispense with proof of its making, thus obviating the necessity of having to call the recording officer. In other words, its contents were never admitted; were it otherwise, liability would never have been in issue. In this context, counsel for the plaintiffs rightly pointed out that at the time of the inclusion of the report in the agreed bundle, the defendant driver was still alive and so, it was intended to be used only either to corroborate or to contradict his version but never as a substitute for oral evidence from the witness box (see s. 60 of the Evidence Act 1950).
>
> This reminds me of what I said in one of my recent judgments as regards the status and categories of agreed bundles of documents. This is how I put it in *Yew Lean Finance Development (M) Sdn. Bhd. v. Tan Gin Thong* [1985] 1 CLJ 299, 303:
>
> > According to Atkin's Court Forms, Vol. 18, 2nd Ed., pp. 348, 349, there are three categories of such agreement, and they may be stated thus:
> >
> > (1) the parties may agree that a statement in a document should be the only 'agreed evidence' upon a point, neither party being at liberty to controvert it by other evidence.
> >
> > (2) the parties may also agree that a statement in a document should be admissible in evidence, either party being at liberty to controvert it by other evidence. A situation where such a course would be ideal is where medical reports are in conflict; in which case it would be desirable that the doctors be able to give evidence by way of oral supplementation: *Jones v. Griffith* [1969] 2 All ER 1015; *Mullard v. Ben Line Steamers Ltd.* [1971] 12 All ER 424.
> >
> > (3) the parties may agree a document as a document. This obviates the necessity of proving the *making* and *authenticity* of the document, but it does not render it *admissible.*

The learned Sessions judge considered these observations to be relevant and applicable to the facts of the instant case. She accordingly held the first respondent's police report to be inadmissible and dismissed the claim on the

ground that there was no evidence to support the allegation of negligence made by the appellants.

Dissatisfied with the result, the appellants appealed to the High Court. The judgment of the learned judge who heard the appeal is reported in [1992] 3 CLJ 1600. In essence, the learned intermediate appellate judge agreed with the reasons given by the Sessions Court. He too applied the observations of Edgar Joseph Jr. J in the passage already quoted. The appeal was accordingly dismissed.

The appellants now appeal to this court. Their counsel has argued that both courts below were in error when they held the first respondent's police report to be inadmissible. The decision of the former Federal Court in *M.A. Clyde v. Wong Ah Mei* [1970] 2 MLJ 183, 1, was prayed in aid and the following passage in the judgment of Gill FJ (later CJ Malaya) was read to us:

> In my judgment if a first information report contains an admission which, is relevant to a claim in a civil action against him, it is admissible in evidence under ss. 17, 18 and 21 of the Evidence Ordinance 1950. I find support for this from the decision in *Bishen Das v. Ram Labhaya* AIR [1916] Lah. 133 with which I respectfully agree, and which went so far as to say that though an admission of guilt made by a defendant to a police officer is not receivable in evidence as a 'confession' as against him if he is on his trial as an accused person, yet it is acceptable in a civil suit as an admission under ss. 17, 18 and 21 of the Evidence Act. The admission, of course, cannot be regarded as conclusive, and it is open to the person who made it to explain it away, which was not done in this case.

I may add that a decision to the same effect is that of the Singapore Court of Appeal in *Tan Song Gou v. Goh Ya Tian* [1983] 1 MLJ 60, where Wee Chong Jin CJ said of the appellant driver's police report that it:

> is a documentary statement in which he stated that his pickup collided into the rear of the taxi while the taxi was stationary. It was an admission by Tan Song Gou that his pickup collided into the rear of Tan Ah Lek' stationary taxi (see ss. 17 and 18 of the Evidence Act). It was admitted in evidence by agreement of the parties as one of the documents in the agreed bundle (exh AB) at the trial and its contents accordingly need not be proved by calling the person who recorded the statement.
>
> By virtue of that admission Tan Ah Lek had adduced evidence at the trial that Tan Song Gou's pickup collided into his stationary taxi and in the absence of other evidence a court is entitled to come to the conclusion that the damage to Tan Ah Lek's taxi as a result of the collision was due to the negligent driving of Tan Song Gou.

Having considered the arguments of counsel on both sides and the authorities cited by them, I am of opinion that the following propositions may be taken as well-settled:

(1) Whether the contents of a document that has been included in an agreed bundle may be used by either party to prove or disprove a fact in issue depends entirely upon the terms of the agreement between the solicitors having conduct of an action. If by their agreement they dispense with formal proof and also agree to the truth of the contents of a particular document, then its contents may be relied upon either side to establish or to disprove a fact in issue. On the other hand, if the agreement is only to forgo proof of the making of the document, then, the contents may not be so used. See, *Yew Lean Finance Development (M) Sdn. Bhd. v. Tan Gin Thong (supra).*

(2) Where a document is included in an agreed bundle without any qualification, then no question as to its formal proof arises and its contents may be relied upon to establish a fact in issue. See, *Henry Trading Co. Ltd. v. Harun* [1966] 2 MLJ 281; *Borneo Co. (M) Sdn. Bhd. v. Penang Port Commission* [1975] 2 MLJ 204.

(3) A party may rely upon an admission made by his opponent in a police report (whether or not it be first information) or other documentary hearsay included in an agreed bundle on the condition that only its formal proof is dispensed with: *M.A. Clyde v. Wong Ah Mei (supra); Tan Song Gou v. Goh Ya Tian (supra)*. However, if such a document is wholly exculpatory of the maker, then it is pure hearsay and inadmissible: *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ 175; *Chuah Ah Chee & Ors v. Gurdial Singh & Anor (supra).* The reasons for its inadmissibility appear sufficiently in the judgment of Ali FJ in *Wong Thin Yit* and that of Edgar Joseph Jr J in *Chuah Ah Chee*. They therefore require no reiteration here.

The present appeal has an additional factor that requires to be addressed. It has to do with the letter written by the respondents' solicitors, which I mentioned earlier in this judgment. It is dated 21 September 1987. The letter, among other things, suggested that the first respondent's police report "be tendered through its maker dispensing with formal proof". Although that letter could have been couched in happier language, it is clear what the parties intended.

The first respondent's police report containing his version of the incident was pure hearsay. As observed by Ali Hassan FJ in *Wong Thin Yit v. Mohamed Ali (supra)* (at p. 180):

> Putting it at its lowest, even if this case has to be decided on the balance of probability, the learned trial judge, on the materials before him, was entitled to conclude that the appellant was wholly to blame for the accident. I have used the words 'even if' advisedly, for in my view the police report in this case, though admissible by reason of s. 35 of the Evidence Ordinance, was not substantive evidence of the fact, as asserted by the defence, that the plaintiff was knocked down while crossing the road. The report of the police officer who recorded it could only say this: 'This is a statement by the appellant'. To that extent the report was clearly hearsay evidence. Its inclusion in the agreed bundle was obviously on the assumption that the appellant would appear at the trial to testify. If he had done, so, the report would undoubtedly have some value as corroborative evidence within the meaning of s. 157 of the Evidence Ordinance. But standing by itself for the purpose of the present dispute it was clearly hearsay.

The parties in the present instance wanted to get over the barrier imposed by the hearsay rule. That is why they agreed to dispense with formal proof and placed the police report in Part II of the agreed bundle. If the first respondent had testified on oath, his report could have been used for purposes of cross-examination. As matters transpired, he did not. Does it then follow that in the circumstances of the present case his report was wholly unavailable for use at the trial?

In my considered view the answer to that question depends upon the determination of another critical question, namely: is the first respondent's police report wholly exculpatory of himself? If it is, then both courts below were right to exclude it from their consideration. If it contained admission(s), then they were plainly obliged to take account of the admissions and weigh them together with the silent evidence when coming to a decision on the facts. This conclusion is obviated by the decisions to which I have earlier referred in this judgment.

The first respondent's police report in the present instance is not wholly self-serving. It contains an admission by him of the circumstances in which he collided with the deceased. The trial court was accordingly wrong in discounting it altogether as a purely exculpatory statement. So too the learned intermediate appellate judge. Because of their approach to the case they did not evaluate the available evidence. It now behoves this court to carry out the task.

According to the defence, the deceased was crossing the road when it was unsafe for her to do so and that is why the collision occurred. The appellants' pleaded case, on the other hand, alleges that the deceased was standing at the centre of the road when she was knocked into. It is common ground that the

scene of the accident is a built up area. Movement of pedestrians must therefore have been well within the reasonable foresight of other road users. The sketch plan appears to indicate the point of impact, in all probability, to be at the centre of the road because that is where the motor cycle is shown to have fallen on impact. Thus, the sketch plan is more supportive of the appellants' case than that set out in the defence. The admission by the first respondent of the circumstances in which the collision occurred, taken together with the other silent evidence reasonably support the inference that the first respondent was solely to blame for the accident. And I so find.

As to damages, the learned Sessions judge quite properly assessed these at RM25,652. There is no quarrel about them.

For the reasons already given, I would allow the appeal and set aside the judgments and orders of the courts below. There shall be judgment for the appellants in the sum of RM25,652 together with interest on the same at the rate of 8% from the date of issue of process. The respondents shall bear the costs occasioned at all levels below. The deposit paid into court shall be refunded to the appellants.

Reported by Mariette Peters-Goh

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